

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DIANNA LYNN SWINFORD,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security

Defendant.

NO. CV-11-116-RHW

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT; GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 16 and Defendant's Motion for Summary Judgment, ECF No. 19. The motions were heard without oral argument. Plaintiff is represented by Jeffrey Schwab. Defendant<sup>1</sup> is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Michael S. Howard.

**I. Jurisdiction**

On November 15, 2006, Plaintiff Dianna Lynn Swinford filed an application for supplemental security income. She alleges she has been disabled since January

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<sup>1</sup>Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

1 1, 2002, due to anxiety disorder, reading disability, ADD, explosive disorder,  
2 personality disorder, and fibromyalgia. (Tr. 173.)

3 Her application was denied initially and again denied on reconsideration. A  
4 timely request for a hearing was made. On September 16, 2009, Plaintiff appeared  
5 at a video hearing in Wenatchee, Washington before Administrative Law Judge  
6 (ALJ) Gene Duncan, who was presiding in Spokane, Washington. Plaintiff was  
7 represented by Kathleen G. Kilcullen, an attorney. Dr. Marian Martin, a clinical  
8 psychologist, and Polly Peterson, a vocational expert, also participated.

9 The ALJ issued a decision on October 9, 2009, finding that Plaintiff was not  
10 disabled. Plaintiff timely requested review by the Appeals Council, which was  
11 denied March 3, 2011. The Appeals Council's denial of review makes the ALJ's  
12 decision the final decision of the Commissioner. (42 U.S.C. §405(h)). Plaintiff  
13 filed a timely appeal with the U.S. District Court for the Eastern District of  
14 Washington on March 29, 2011. The instant matter is before the district court  
15 pursuant to 42 U.S.C. § 405(g).

## 16 **II. Sequential Evaluation Process**

17 The Social Security Act defines disability as the "inability to engage in any  
18 substantial gainful activity by reason of any medically determinable physical or  
19 mental impairment which can be expected to result in death or which has lasted or  
20 can be expected to last for a continuous period of not less than twelve months."

21 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be  
22 under a disability only if her impairments are of such severity that the claimant is  
23 not only unable to do her previous work, but cannot, considering claimant's age,  
24 education and work experiences, engage in any other substantial gainful work  
25 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

26 The Commissioner has established a five-step sequential evaluation process  
27 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),  
28 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

1 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.  
2 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and  
3 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,  
4 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is  
5 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,  
6 416.920(b). If he is not, the ALJ proceeds to step two.

7 Step 2: Does the claimant have a medically-severe impairment or  
8 combination of impairments? 20 C.F.R. §§ 404.1520©, 416.920©. If the claimant  
9 does not have a severe impairment or combination of impairments, the disability  
10 claim is denied. A severe impairment is one that lasted or must be expected to last  
11 for at least 12 months and must be proven through objective medical evidence. 20  
12 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is severe, the evaluation  
13 proceeds to the third step.

14 Step 3: Does the claimant's impairment meet or equal one of the listed  
15 impairments acknowledged by the Commissioner to be so severe as to preclude  
16 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.  
17 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed  
18 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the  
19 impairment is not one conclusively presumed to be disabling, the evaluation  
20 proceeds to the fourth step.

21 Step 4: Does the impairment prevent the claimant from performing work she  
22 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant  
23 is able to perform her previous work, she is not disabled. *Id.* If the claimant  
24 cannot perform this work, proceed to the fifth and final step.

25 Step 5: Is the claimant able to perform other work in the national economy  
26 in view of her age, education, and work experience? 20 C.F.R. §§ 404.1520(f),  
27 416.920(f).

28 The initial burden of proof rests upon the claimant to establish a prima facie

1 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098  
2 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or  
3 mental impairment prevents her from engaging in her previous occupation. *Id.* At  
4 step five, the burden shifts to the Commissioner to show that the claimant can  
5 perform other substantial gainful activity. *Id.*

### 6 **III. Standard of Review**

7 The Commissioner's determination will be set aside only when the ALJ's  
8 findings are based on legal error or are not supported by substantial evidence in  
9 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)  
10 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"  
11 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."  
12 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial  
13 evidence is "such relevant evidence as a reasonable mind might accept as adequate  
14 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the  
15 ALJ's denial of benefits if the evidence is susceptible to more than one rational  
16 interpretation, one of which supports the decision of the administrative law judge.  
17 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can  
18 support either outcome, the court may not substitute its judgment for that of the  
19 ALJ." *Matney*, 981 F.2d at 1019.

20 A decision supported by substantial evidence will be set aside if the proper  
21 legal standards were not applied in weighing the evidence and making the  
22 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th  
23 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are  
24 immaterial to the ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec.*  
25 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

### 26 **IV. Statement of Facts**

27 The facts have been presented in the administrative transcript and the ALJ's  
28 decision, and will only be summarized here.

1 At the time of the hearing, Plaintiff was 40 years old. She completed the 10<sup>th</sup>  
2 grade, and has attempted on numerous times to obtain her GED, but has always  
3 failed. Plaintiff experienced an abusive childhood. Her mother was on welfare and  
4 she moved about 30 times while she was growing up. She reported she was  
5 sexually threatened, molested, and rape by her brothers, and she was also raped by  
6 her maternal grandfather. Consequently, she struggled in school.

7 Plaintiff testified that she has trouble reading a newspaper in that she has  
8 problems understanding and remembering the words she reads. She also reported  
9 she has trouble remembering conversations. At the hearing, she predicted she  
10 would not be able to recall the hearing once it was concluded. (Tr. 39.) The results  
11 of IQ tests indicate that she is in the low-average range. Testing also indicates her  
12 working memory is at a deficit, which means she has a deficiency in her ability  
13 manipulate auditory and visual information in short-term memory. (Tr. 239.) Her  
14 last job was at Kmart. She testified she was asked to leave because she could not  
15 perform the job to its standards.<sup>2</sup> (Tr. 38-39.)

16 Plaintiff has been receiving treatment from April Shipowick-Smith, M.A.,  
17 L.M.H.C., since February, 2002. It was determined that Plaintiff was taking  
18 Seroquel, Wellbutrin, Amitriptyline for psychological issues and Lyrica for her  
19 fibromyalgia.

## 20 **V. The ALJ's findings**

21 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
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23 <sup>2</sup>In 2001, Plaintiff told Dr. Rowe that “she left the job because she developed  
24 problems with her heart and back and got depressed and then overdosed on her  
25 medicine and was treated at the Lake Chelan emergency room. (Tr. 236.) In  
26 November, 2006, she reported to Dr. Bauer, M.D., that at her last job she had  
27 difficulty remembering tasks assigned to her and she would get so frustrated she  
28 could not perform her job. (Tr. 248.)

1 activity since November 15, 2006, the application date. (Tr. 23.)

2 At step two, the ALJ found Plaintiff has the following severe impairments:  
3 major depressive disorder, anxiety, and complaints of low back pain. He  
4 specifically found the following impairments to *not* be severe: shoulder  
5 impairment, attention deficit hyperactivity disorder (ADHD), low intellectual  
6 functioning, and obesity. (Tr. 23.)

7 At step three, the ALJ found Plaintiff's impairments or combination of  
8 impairments did not meet or medically equal any of the listed impairments  
9 described at 20 CFR Part 404, Subpart P, Appendix 1. (20 CFR 404.1520(d),  
10 404.1525, 404.1526, 416.925 and 416.926). (Tr. 26.) The ALJ relied on the  
11 testimony of Dr. Martin, who indicated that Plaintiff did not have any marked  
12 restrictions or difficulties, in concluding that paragraphs B and C were not met.

13 The ALJ determined Plaintiff has the residual functional capacity to perform  
14 a wide range of simple routine light and sedentary level work as defined by 20  
15 C.F.R. § 416.967(b)<sup>3</sup> with limitations for only occasional postural manipulations;  
16 bending at the waist; and no exposure to unprotected heights, machinery and  
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18 <sup>3</sup>(b) Light work. Light work involves lifting no more than 20 pounds at a time  
19 with frequent lifting or carrying of objects weighing up to 10 pounds. Even though  
20 the weight lifted may be very little, a job is in this category when it requires a  
21 good deal of walking or standing, or when it involves sitting most of the time with  
22 some pushing and pulling of arm or leg controls. To be considered capable of  
23 performing a full or wide range of light work, you must have the ability to do  
24 substantially all of these activities. If someone can do light work, we determine  
25 that he or she can also do sedentary work, unless there are additional limiting  
26 factors such as loss of fine dexterity or inability to sit for long periods of time.  
27

28 20 C.F.R. § 416.967

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1 vibrating equipment, no intense interaction with others, only superficial contact  
2 with coworkers and the public, and the need for written and hands-on instruction  
3 when learning new tasks. (Tr. 27.)

4 At step four, the ALJ found Plaintiff has no significant past relevant work  
5 experience. (Tr. 28.)

6 At step five, after considering Plaintiff's age, education, work experience,  
7 residual functional capacity and the testimony of Ms. Peterson, a vocational  
8 expert, the ALJ found there are jobs that exist in significant numbers in the  
9 national economy that Plaintiff could perform, such as cannery worker, potato  
10 inspector, and agriculture sorter. (Tr. 29.) As such, Plaintiff was not disabled.

## 11 **VI. Issues for Review**

12 The question is whether the ALJ's decision is supported by substantial  
13 evidence and free of legal error. Specifically, Plaintiff argues the ALJ: (1) failed to  
14 provide an accurate hypothetical which accurately represented the testimony of the  
15 medical expert; and (2) erred in not considering lay evidence and concurring  
16 opinions for the "B" criteria. Plaintiff asserts the ALJ should have adopted the  
17 functional imitations of Dr. Rowe<sup>4</sup> and Ms. Shipowick-Smith.

## 18 **VII. Discussion**

### 19 **1. Testimony about Plaintiff's Work Absences**

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21 <sup>4</sup>Plaintiff did not provide a cite to the record that pinpoints Dr. Rowe's  
22 functional assessments or functional limitations. Dr. Rowe did not identify any  
23 specific functional limitations in his report. He did indicate that he believed  
24 Plaintiff had a learning disorder, NOS, because she always attended special  
25 education classes, her continued inability to pass her GED exams, and the fact that  
26 tests indicate she has low-average intellectual ability. (Tr. 240.) The RFC reflects  
27 simple routine work, which incorporates Plaintiff's low-average intellectual ability  
28 and would apply even if a specific learning disorder was supported by the record.



1 Plaintiff argues the ALJ misconstrued the testimony of Dr. Martin, the  
2 medical expert, and consequently presented an insufficient hypothetical to Ms.  
3 Peterson, the vocational expert.

4 “In order for the testimony of the vocational expert to be considered  
5 reliable, the hypothetical posed must include ‘all of the claimant’s functional  
6 limitations, both physical and mental’ supported by the record.” *Thomas v.*  
7 *Barnhart*, 278 F.3d 947, 956 (9<sup>th</sup> Cir. 2002).

8 In testifying, Dr. Martin indicated she believed there would be times when  
9 Plaintiff might have difficulty getting to work. (Tr. 60.) She thought that “out of a  
10 month she might have some days there where she’s down and more anxious or  
11 whatever.” (Tr. 60.) The ALJ asked her to clarify whether she meant every two or  
12 three or four months. (Tr. 60.)

13 Dr. Martin explained:

14 Well you know that’s where it’s a little hard to say because at this  
15 point it looks like her mood disorder and her anxiety disorder are  
16 fairly well stabilized on her medication. But then I— and so I don’t  
17 think she would have you know, that much difficulty as long as she  
18 stays stabilized on her medicine. But if there were some significant  
19 stress that came in to her life I don’t think she’d be able to express  
20 this very well. And so then that could send her into a you know, a  
21 more severe depression or more, or increased symptoms of anxiety  
22 and she might have difficulty. And I can’t, I don’t know how to  
23 predict that because you know it depends on her stresses basically I  
24 think.  
25 (Tr. 60.)

26 The ALJ then included in the hypothetical presented to Ms. Peterson the  
27 limitation that Plaintiff “would miss three days work consecutively every three  
28 months.” (Tr. 80.) Ms. Peterson concluded Plaintiff would be able to work. (Tr.  
81.) On re-examination by Plaintiff’s attorney, Ms. Peterson indicated that if an  
employee had three days consecutively every three months, but could work  
without absences for the other two months, the employee would be retained. (Tr.  
90.)

Plaintiff argues Dr. Martin’s testimony should be interpreted to mean that



1 Plaintiff should be expected to miss some days out of every month. ECF No. 17 at  
2 5 (“Dr. Martin testified the plaintiff could be expected to miss ‘some days’ ‘out of  
3 a month, which would commonly describe two or more days per month that the  
4 plaintiff would not complete a normal workday or work week.”). Plaintiff mis-  
5 characterizes Dr. Martin’s testimony. Dr. Martin stated that Plaintiff *might* have  
6 some days which would preclude work. Such qualification indicates Dr. Martin’s  
7 belief that the absences would not occur every month. Moreover, the subsequent  
8 paragraph demonstrates Dr. Martin was equivocal regarding specific time  
9 absences and stated it would depend on Plaintiff’s stresses.

10 The hypothetical posed by the ALJ to the vocations expert is supported by  
11 Dr. Martin’s testimony, and the ALJ’s interpretation of that testimony was  
12 reasonable. Dr. Martin did not anticipate absences because her mood disorder and  
13 her anxiety disorder are fairly stabilized on medication, but she allowed the  
14 possibility that at times Plaintiff *may* experience some stresses, which *may* cause  
15 her to miss work. The ALJ’s hypothetical reflected this possibility. The ALJ did  
16 not err in presenting this limitation to the vocational expert.

## 17 2. Whether Plaintiff Meets Listing

18 Plaintiff argues the ALJ erred in not considering April Shipowick-Smith’s  
19 opinion in determining whether she met the “B” criteria. Plaintiff did not identify  
20 which listings she believed she met if Ms. Shipowick-Smith’s testimony was  
21 considered.

22 To meet a listed impairment, a claimant must show that she meets each  
23 characteristic of a listed impairment relevant to her claim. To equal a listed  
24 impairment, a claimant must establish symptoms, signs and laboratory findings “at  
25 least in severity and duration” to the characteristics of a relevant listed  
26 impairment, or if a claimant’s impairment is not listed, then to the listed  
27 impairment “most like” the claimant’s impairment. 20 C.F.R. § 404.1526; *Tackett*  
28 *v. Apfel*, 180 F.3d 1094, 1099 (9<sup>th</sup> Cir. 1999).

1 The ALJ found Plaintiff did not have an impairment or combination of  
2 impairments that meets or medically equals one of the listed impairments, but did  
3 not identify any particular listing the ALJ considered. (Tr. 26.) At the hearing, Dr.  
4 Martin identified the following possible Listings: 12.02 (organic mental/brain  
5 disorders) for diagnoses of ADHD, 12.04 (affective disorders) for bipolar and  
6 depressive disorders, 12.06 (anxiety-related disorders) for generalized anxiety. (Tr.  
7 45-46.) Dr. Martin concluded these impairments were all well-managed with  
8 medication, or determined the record did not support a diagnoses. (Tr. 46.)

9 Ultimately, Dr. Martin concluded that Plaintiff did not have any marked  
10 degree of limitations in activities of daily living, maintaining social function, or  
11 maintaining concentration, persistence or pace, which would have been necessary  
12 to meet any of these Listings.<sup>5</sup> (Tr. 50-51.) And he noted she did not have any  
13 episodes of decompensation. (Tr. 51.)

14 In contrast, Ms. Shipowick-Smith completed a Psychological/Psychiatric  
15 Evaluation in 2006 where she found that Plaintiff had the following *marked*  
16 characteristics: memory defects for recent events; impoverished, slowed,  
17 perseverative thinking, with confusion or disorientation; and labile, shallow or  
18 coarse affect. (Tr. 337.) These symptoms were due to her short attention span and  
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20 <sup>5</sup>He noted the following *moderate* limitations: ability to understand, remember  
21 and carry out detailed instructions; maintain attention/concentration for extended  
22 periods; work in coordination with or proximity to others without distraction;  
23 complete a normal workday/week without interruptions from psychologically-  
24 based symptoms and perform at a consistent pace without an unreasonable number  
25 and length of rest periods; accept instructions/responding appropriately to  
26 criticism from supervisors; get along with coworkers or peers without distraction  
27 or exhibiting behavior extremes; and respond appropriately to changes in the work  
28 setting. (Tr. 58.)

1 difficulty processing. (Tr. 337.) In terms of functional mental disorder, Ms.  
2 Shipowick-Smith found the following *severe* symptoms: expression of anger  
3 (verbal and/or physical), social withdrawal, paranoid behavior, and physical  
4 complaints, and the following *marked* symptoms: verbal expression of anxiety or  
5 fear, motor agitation, and thought disorder. (Tr. 338.) She noted the following  
6 functional limitations as *severe*: ability to understand, remember and follow simple  
7 (one or two step) instructions; ability to understand, remember and follow  
8 complex (more than two step) instruction; ability to interact appropriately in  
9 public contacts, and the ability to respond appropriately to and tolerate the  
10 pressures and expectations of a normal work setting. (Tr. 339.) She noted the  
11 following functional limitations as *marked*: ability to exercise judgment and make  
12 decisions, ability to relate appropriately to co-workers and supervisors; and ability  
13 to care for self, including personal hygiene and appearance, and the following  
14 functional limitations as *moderate*: ability to learn new tasks, ability to perform  
15 routine tasks, and ability to control physical or motor movements and maintain  
16 appropriate behavior. (Tr. 339.)

17 In 2008, Ms. Shipowick-Smith completed another Psychological/Psychiatric  
18 Evaluation in which she noted that Plaintiff's condition is deteriorating in that she  
19 cannot remember conversations immediately following the end of a conversation  
20 and she has difficulty completing tasks. (Tr. 368.) However, she no longer  
21 believed that Plaintiff had any *severe* symptoms, except for her physical  
22 complaints. In terms of global illness, she indicated marked, rather than the 2006  
23 severe rating. (Tr. 368.) She also noted that Plaintiff had a *severe* impairment in  
24 the ability to understand, remember and follow complex (more than two step)  
25 instructions. (Tr. 370.)

26 In 2009, Ms. Shipowick-Smith completed a Psychological/Psychiatric  
27 Evaluation that was similar to the 2008 evaluation, but she no longer had any  
28 severe limitations. (Tr. 482-84.) She did not rate the social factors, which would

1 include the ability to work with co-workers and supervisors and the public.

2 In 2010, Ms. Shipowick-Smith completed a physical evaluation, in which  
3 she indicated that due to her bipolar and depression, Plaintiff had marked  
4 interference with communicating and understanding or following directions. (Tr.  
5 487.)

6 Ms. Shipowick-Smith was Plaintiff's therapist. Ms. Shipowick-Smith  
7 believes Plaintiff is unable to work (Tr. 257.) Ms. Shipowick-Smith maintains the  
8 physical and emotional abuse Plaintiff suffered at the hands of her family members  
9 left permanent emotional damage and physical disabilities (Tr. 451.) She stated the  
10 abuse left Plaintiff with unpredictable anger outbursts, extreme anxiety, reactive  
11 attachment disorder, social phobia and other anti-social behavior patterns. (Tr.  
12 451.) She did not believe counseling had mitigated the residual effect of her past.  
13 (Tr. 451.)

14 The ALJ rejected Ms. Shipowick-Smith's opinion, explaining that her  
15 opinions was "completely contrary to the ongoing treatment records, as well as all  
16 other *medical* source opinion evidence of record." (Tr. 28.) (emphasis in original).

17 Pursuant to 20 C.F.R. §§ 404.1513(d) and 416.913(d), therapists are  
18 considered "other sources," not "acceptable medical sources." *See also* SSR 06-  
19 03p.<sup>6</sup> As SSR 06-03p explains:

20 Information from these "other sources" cannot establish the existence  
21 of a medically determinable impairment. Instead, there must be  
22 evidence from an "acceptable medical source" for this purpose.  
23 However, information from such "other sources" may be based on  
special knowledge of the individual and may provide insight into the  
severity of the impairment(s) and how it affects the individual's  
ability to function.

24  
25 <sup>6</sup>"Titles II and XVI: Considering Opinions and Other Evidence From Sources  
26 Who Are Not "Acceptable Medical Sources" in Disability Claims; Considering  
27 Decisions on Disability by Other Governmental and Nongovernmental Agencies,"  
28 (April 9, 2006).

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1 The Ruling acknowledges it maybe appropriate to give more weight to the  
2 opinion of a medical source who is not an “acceptable medical source” if she has  
3 seen the individual more often than the treating sources and has provided better  
4 supporting evidence and a better explanation of her opinion. SSR-06-03p.  
5 It is the ALJ’s duty to resolve conflicts and ambiguity in the medical and non-  
6 medical evidence. *See Morgan v. Comm’r Soc. Sec. Admin.*, 169 F.3d 595, 599–600  
7 (9<sup>th</sup> Cir. 1999).

8 The ALJ did not commit legal error in rejecting Ms. Shipowick-Smith’s  
9 opinion, because it conflicted with other medical records that indicated Plaintiff  
10 was stable or under control with medication. Moreover, Plaintiff has not attempted  
11 to show how Ms. Shipowick-Smith’s opinion supports a finding that Plaintiff  
12 meets or equals one of the Listings. Indeed, there is nothing in Plaintiff’s briefing  
13 that refers to any criteria for any specific Listing.

14 In 2007, Dr. Genthe, licensed psychologist, conducted a psychological  
15 evaluation to clarify her current level of memory, intellectual and emotional  
16 function. (Tr. 303.) He is an “acceptable medical source.” *See* SSR 06-03p. He  
17 completed a Psychological Assessment Report at the request of the Department of  
18 Disability Determination Services (DDDS). (Tr. 303.) Plaintiff reported to Dr.  
19 Genthe that the predominate reason for her being presently not employed was due  
20 to physical reasons. (Tr. 303.) Based on testing, Dr. Genthe identified that Plaintiff  
21 may experience difficulty in holding information to perform a specific task. (Tr.  
22 307.) Difficulties with her working memory may make the processing of complex  
23 information more time-consuming, drain her mental energies more quickly, and  
24 perhaps result in more frequent error on a variety of learning tasks. (Tr. 307.) He  
25 also noted that her skill in processing visual material without making errors is  
26 below that of her peers. (Tr. 308.) But he concluded that Plaintiff presented with  
27 normal mental status, with no significant symptoms of emotional functioning  
28 distress or impairment. (Tr. 303-304).

1 Also in 2007, Dr. Garfield, DO, examined Plaintiff and did not observe any  
2 significant objective findings that would prevent Plaintiff from walking, standing,  
3 or sitting for eight hours in an eight-hour day. (Tr. 330.) He limited Plaintiff to not  
4 carrying more than 10 pounds frequently and 20 pounds occasionally, with some  
5 postural limitations. (Tr. 331.)

6 The ALJ did not err in rejecting Ms. Shipowick-Smith's opinion, and  
7 incorporating the opinions of Dr. Martin, Dr. Genthe, Dr. Garfield, and Dr. Beaty  
8 into Plaintiff's residual functional capacity. The residual functional capacity  
9 incorporates Plaintiff's depressive and anxiety impairments and incorporates  
10 Plaintiff's memory struggles by requiring simple routine tasks and the need for  
11 written hands-on instruction.

12 Plaintiff accuses Dr. Martin of being unfamiliar with the record.  
13 Specifically, she states Dr. Martin "seem unfamiliar with the record of Dr. Rowe  
14 as to the diagnosis of Listing 12.08 and borderline personality." ECF No. 17 at 7.  
15 Plaintiff's interpretation of Dr. Martin's testimony is not accurate. At the hearing,  
16 Dr. Martin explained that she did not consider Dr. Rowe's mention of borderline  
17 personality because Dr. Rowe did not make an actual diagnosis. Rather, she  
18 interpreted Dr. Rowe's report as indicating that he noted there were some features  
19 that would be consistent with borderline personality disorder, but he did not feel  
20 he had enough information or evidence to make a full diagnosis. (Tr. 49.) She also  
21 did not consider Ms. Shipowick-Smith's finding of oppositional defiant disorder  
22 because this diagnoses is normally made in children. (Tr. 49.) Initially, Ms. Martin  
23 expressed surprise by the ALJ's reference to borderline personality disorder, but it  
24 was not because she was unfamiliar with the record; rather, she did not see a  
25 definitive diagnoses in the record and therefore she did not include it in her  
26 analysis.

27 Also, the Court notes the one reason the ALJ relied upon for rejecting the  
28 Department of Social and Health Services' (DSHS) psychological assessments



1 was because these assessments are “known to be lenient, and are for the primary  
2 purpose of extending state benefits.” (Tr. 28.) This is not an appropriate reason for  
3 rejecting the assessments. An ALJ should not base his opinion of medical  
4 evidence on personal experiences or evidence which is not part of the record. *See*  
5 *Reed v. Massanari*, 270 F.3d 838, 843-44 (9<sup>th</sup> Cir. 2001) (finding it was improper  
6 for the ALJ to reject opinions of doctors based on past experience). Furthermore,  
7 the purpose for which medical reports are obtained does not provide a legitimate  
8 basis for rejecting them. *Lester v. Chater*, 81 F.3d 821, 832 (9<sup>th</sup> Cir. 1996). Despite  
9 citing this inappropriate reason, the ALJ gave other specific legitimate reasons  
10 supported by substantial evidence which support the ALJ’s rejection of Ms.  
11 Shipowick-Smith’s opinion and the DSHS’s psychological capacity assessments.  
12 *See e.g., Morgan*, 169 F.3d at 601–02. Therefore, the outcome is the same despite  
13 the improper reasoning. Errors that do not affect the ultimate result are harmless.  
14 *See Parra v. Astrue*, 481 F.3d 742, 747 (9<sup>th</sup> Cir. 2007).

### 15 **VIII. Conclusion**

16 Plaintiff has not met her burden of showing the ALJ’s decision is not  
17 supported by substantial evidence or that the ALJ committed legal error. The ALJ  
18 did not err in finding Plaintiff’s residual functional capacity because it is  
19 supported by substantial evidence. The record demonstrates that Plaintiff’s mental  
20 health impairments, namely depression and anxiety, are controlled by medication  
21 and the RFC provides the appropriate limitations that accurately account for  
22 Plaintiff’s impairments. As such, substantial evidence supports the ALJ’s decision  
23 that Plaintiff is not disabled.

24 Accordingly, **IT IS HEREBY ORDERED:**

25 1. Plaintiff’s Motion for Summary Judgment, ECF No. 16, is **DENIED**.

26 2. Defendant’s Motion for Summary Judgment, ECF No. 19, is

27 **GRANTED.**

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**ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY  
JUDGMENT; GRANTING DEFENDANT’S MOTION FOR SUMMARY  
JUDGMENT ~ 15**



**IT IS SO ORDERED.** The District Court Executive is hereby directed to file this Order and provide copies to counsel, and **close the file**.

**DATED** this 15<sup>th</sup> day of August, 2013.

*s/Robert H. Whaley*

ROBERT H. WHALEY  
United States District Judge

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